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MICHAEL RODAK, JR., CLERK

No. 77-1184

In the Supreme Court of the United States

OCTOBER TERM, 1977

ANTHONY J. PERLONGO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINION BELOW

The order of the Court of Claims (Pet. App. 1a-5a) is not reported.

JURISDICTION

The order of the Court of Claims (Pet. App. 1a-5a) was entered on November 25, 1977. The petition for a writ of certiorari was filed on February 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the allegation of a federal probationary employee that he was dismissed as a result of malice engendered by his report of a superior's misconduct requires the holding of a trial concerning the propriety of the dismissal.

STATEMENT

Petitioner, formerly a probationary employee of the Drug Enforcement Administration (DEA), was dismissed during a basic ten-week training program for special agents. The notice of dismissal stated that petitioner's conduct demonstrated he was "uncooperative, argumentative, * * * lack[ing in] discipline, and * * * unable to accept constructive criticism" (Pet. App. 2a).¹ The notice also stated that petitioner lacked the ability to apply training principles to field situations (*ibid.*). He filed an "appeal" with the Civil Service Commission, but the Commission held that it could not review the dismissal of a probationary employee (Pet. 4).²

Petitioner filed this suit in the Court of Claims, seeking back pay, an order of reinstatement, and correction of his records to reflect continuous service. He argued that DEA's actions were "illegal, arbitrary and capricious" because the reasons as set forth in the notice were not the true reasons (Complaint para. 7). The actual reasons, petitioner alleged, were "certain disclosures * * * [that petitioner made had] placed a certain supervisory official

¹The decision to recommend petitioner's termination was made by a majority of nine staff members at a staff meeting (see Pet. App. 4a). This recommendation was forwarded to the Chief of the Basic Programs Section, who recommended to the Chief of the Enforcement Training Division that petitioner be discharged. The latter recommended similarly to the Director of the New York Regional Office, who ultimately approved the decision (*ibid.*).

²5 C.F.R. 315.806 provides that a probationary employee who is discharged for unsatisfactory job performance during the probationary period may appeal the discharge to the Civil Service Commission only on the grounds that the discharge was the result of discrimination (based on race, religion, sex, national origin, physical handicap) or of partisan political considerations. Petitioner did not allege that such considerations played a role in his discharge.

in an unfavorable light" (*ibid.*). Petitioner also contended that he should have received an administrative hearing.³

The United States moved for summary judgment. It provided the court with petitioner's examination scores and other exhibits indicating that petitioner's performance throughout the course of the training program was either marginal or unsatisfactory; that petitioner on numerous specified occasions had been embroiled in acrimonious exchanges with supervisors, peers, and others; and that, after an altercation with one of his instructors, petitioner had written a memorandum broadly attacking the instructor's character in a manner that the staff considered to be irresponsible and slanderous.⁴ Although petitioner then argued that he was a capable employee, he did not offer any evidence that would show the accuracy of the charges leveled against his instructor. The United States answered, in turn, by submitting affidavits of the eight DEA staff members who had recommended petitioner's dismissal. Each affidavit stated that the dismissal had been based on petitioner's lack of promise as an agent.

The Court of Claims granted summary judgment against petitioner (Pet. App. 1a-5a). Because petitioner was a probationary employee, it held, he was entitled to administrative review of his dismissal "only to the extent

³5 C.F.R. 315.804 provides that a probationary employee has the right to be notified, before termination of his employment, of the agency's "conclusions as to the inadequacies of [the probationer's] performance or conduct." No rule or statute creates a right to a pre-discharge hearing.

⁴These charges included "alcoholism" and taking "delight in criminally and sadistically abusing an informant" (see Pet. App. 4a). (Petitioner had also accused the instructor of consuming beer on government property. The instructor admitted this allegation and was suspended for three days.)

provided by the regulations of the Civil Service Commission" (Pet. App. 2a). The court concluded that petitioner received his due when he was notified of the agency's "conclusions as to the inadequacies of [his] performance or conduct * * *" (*id.* at 3a). The only substantive requirement imposed by the Civil Service regulations was that petitioner's discharge be based on the agency's honest dissatisfaction with his performance, and the court concluded that "the record shows there is substantial evidence and a rational basis for the action taken by the DEA officials" (*id.* at 4a). The court also stressed that petitioner alleged facts showing possible bias on the part of only one of the eight instructors who voted to terminate him, and that the actions of the other seven, as well as those of the higher officials who reviewed and acted upon the recommendation of the staff, must be presumed to have been undertaken in good faith (*ibid.*).

ARGUMENT

1. A motion for summary judgment is appropriate if there is no genuine issue of material fact. All genuine disputes about material facts must be resolved in favor of the opposing party. Court of Claims Rule 101(d);⁵ *Arnett v. Kennedy*, 416 U.S. 134, 139-140 (plurality opinion). Once a party has filed affidavits supporting a motion for summary judgment, however, the opposing party must present by affidavit facts that show how he could support his own position at trial. In the absence of adequate countervailing affidavits, the court may accept as true the statements in the proponent's affidavits. Petitioner did not pierce the government's affidavits, and summary judgment therefore was properly entered against him.

⁵The language and construction of Rule 101 track that of Fed. R. Civ. P. 56.

As a probationary federal employee, petitioner had no statutory entitlement to continued employment, and therefore he had no constitutional entitlement to any particular proceedings on dismissal. *Bishop v. Wood*, 426 U.S. 341. The premise of this Court's disposition of *Arnett v. Kennedy*, *supra*, is that the Lloyd-LaFollette Act, now codified in 5 U.S.C. 7501 *et seq.*, created a "statutory expectancy" that non-probationary federal employees may be removed only for "cause." That expectancy does not arise, however, until the period of probation has been completed, and during that time an employee's procedural rights must find their source in particular rules or statutes. *Board of Regents v. Roth*, 408 U.S. 564. It is well established that the Lloyd-LaFollette Act has no application to probationary employees, who are not members of the classified civil service. *Powers v. United States*, 169 Ct. Cl. 626, 629. Petitioner does not contend otherwise, and his rights concerning discharge thus depend entirely on rules promulgated by the Civil Service Commission.

Those regulations gave petitioner an entitlement to a written notice of termination stating "the agency's conclusions as to the inadequacies of his performance." 5 C.F.R. 315.804. The Court of Claims properly concluded that the undisputed evidence established that this requirement was satisfied (Pet. App. 3a), because petitioner received such a notice, which stated (Exh. CC to the government's Motion for Summary Judgment):

On the basis of evaluations and appraisals of your conduct and performance while on duty during special agent training which began on September 8, 1975 it has been determined that you have not demonstrated character traits necessary for satisfactory performance as a Career employee. Staff officials of the Drug Enforcement Administration

National Training Institute who have counselled you and observed and evaluated your conduct and performance have indicated that you have been uncooperative, argumentative, you lack self discipline and you are unable to accept constructive criticism. In addition, it was reported by training officials that you lack the ability to apply to realistic field training situations those principles and techniques which were taught in the academic portion of training such as inability to perform satisfactorily in a simple surveillance situation.

The court also concluded that the Civil Service regulations required that the agency's action be founded on genuine dissatisfaction with the employee's performance. The gist of petitioner's complaint is that his performance was adequate and that the instructor whom he had reported for misconduct brought about his dismissal in retaliation for this report. But, as the Court of Claims concluded, in the circumstances of this case this allegation did not raise a material issue of fact. The government presented the affidavits of the members of the training staff who voted for petitioner's dismissal, which reflected dissatisfaction with various facets of petitioner's performance. Numerous examples of petitioner's poor performance and emotional behavior were cited, and members of the DEA staff swore that these reasons in combination formed the basis for their recommendation of discharge. Petitioner does not allege that the incidents recited did not take place or that the affidavits and statement of reasons show on their faces that there was an improper motive.⁶ Cf. *Dunlop v. Bachowski*, 421 U.S.

⁶Petitioner's assertion (Pet. 7) that "at no time has [he] been given an opportunity to support his charges * * *" is incorrect. By court order, petitioner had access to all relevant DEA documents and was free to depose witnesses and to supplement his conclusory statements with specific examples.

560, 572-573 (when a statute does not authorize review of an agency's substantive decision, "the court's review should be confined to examination of the 'reasons' statement, and the determination whether the statement, without more, evinces that the [administrative] decision is so irrational as to constitute the decision arbitrary and capricious"). As the Court of Claims correctly concluded, "the record shows there is substantial evidence and a rational basis for the action taken by the DEA officials" (Pet. App. 4a).⁷

Moreover, the training staff's recommendation was forwarded to the chief of the training staff and then to the Director of the New York regional office, who gave final approval to the recommendation and informed petitioner of the reasons for his termination. The Court of Claims concluded that, regardless of petitioner's allegation of the malice of the instructor whom he had reported for misconduct, petitioner had not alleged bias on the part of either the majority of the training staff who initially recommended his termination or on the part of the officials who approved this recommendation (Pet. App. 4a).⁸ Accordingly, because the officials who ultimately

⁷Except for some oblique references to the First Amendment in his petition for a writ of certiorari, petitioner has alleged throughout these proceedings only violation of Civil Service regulations. *Swaaley v. United States*, 376 F. 2d 857 (Ct. Cl.), and *Jackson v. United States*, 428 F. 2d 844 (Ct. Cl.), relied on by petitioner (Pet. 7, 13-14), were based on the First Amendment and are distinguishable for that reason.

⁸Paragraph 15 of the complaint alleged that "[t]he reasons as set forth in the notice were not the true reasons for plaintiff's separation but were manufactured by Washington, D.C. training officials to cover up the program of retaliation initiated against [petitioner] by the Special Agent, who had himself been guilty of misconduct while on duty." This allegation was repeated in paragraph 7 of petitioner's affidavit accompanying his cross motion for summary judgment. The Court of Claims apparently accepted the government's argument that such naked and general allegations did not create a factual issue warranting trial. See Fed. R. Civ. P. 56(e) (the affidavits must set forth "specific facts" "as would be admissible in evidence").

determined that petitioner should be discharged must be presumed to have acted in good faith, petitioner's allegations of malice on the part of one staff member did not require a trial.

2. Petitioner's further allegations that his dismissal "stigmatized" him did not warrant a hearing. *Bishop v. Wood, supra*, 426 U.S. at 348, holds that a discharged public employee whose position is terminable at the will of the employer has suffered no deprivation of liberty so long as "there is no public disclosure of the reasons for this discharge." Petitioner has not alleged that the DEA made any public disclosure of the reasons for his dismissal. Absent an allegation that the reasons for petitioner's termination were made public, petitioner's objection to the reasons "neither enhances nor diminishes petitioner's claim that his constitutionally protected liberty interest is impaired." *Bishop v. Wood, supra*, 426 U.S. at 349.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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